Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

SONKEN-GALAMBA CORPORATION, a corporation, and W. C. BERRY, Petitioners,

vs.

BUTLER IRON & STEEL COMPANY, INCORPORATED, a corporation, Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals for the Eighth Circuit was rendered April 30, 1941. It is reported as *Sonken-Galamba Corporation et al.* v. *Butler Iron & Steel Company, Inc.*, in 119 F. 2d 283. It is shown in full at pages 210-218 of the printed Record.

II.

JURISDICTION.

A complete statement of the basis of the jurisdiction of this Court has been given under heading B in the peti-

tion, *supra*. In the interest of brevity, it is not repeated here.

III.

STATEMENT OF THE CASE.

A full statement of the case has been given under heading A in the petition, *supra*, and in the interest of brevity will not be repeated at this point.

IV.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in holding that under the law of the State of Kansas upon breach of a contract of sale determination and notice by seller that it will resell for the account of buyer and credit proceeds, followed by such resale, does not constitute an irrevocable election precluding recovery on any other basis.

2. The Circuit Court of Appeals erred in refusing to recognize, follow and apply the law of the State of Kansas as to the basis of liability and measure of damages upon breach of a Kansas contract of sale where the seller has elected to resell, credit the proceeds and hold the buyer for the difference.

3. The Circuit Court of Appeals erred in holding that under the law of the State of Kansas upon breach of contract of sale, where seller elected to resell for account of buyer and credit proceeds, recovery could be had upon pleading and proof of difference between contract price and market value of goods.

4. The Circuit Court of Appeals erred in holding that under the law of the State of Kansas upon breach of contract of sale, where seller elected to resell for account of buyer and credit proceeds, measure of damages is difference between the contract price and market value of the goods.

V.

ARGUMENT.

In Kansas it is held that on breach of a contract of sale by the buyer the seller has a choice of remedies he may pursue. One choice he may make is to treat the contract as broken, resell the goods to recompense himself as far as possible for whatever loss he has sustained and sue to recover "the remaining damages." If the seller determines to and notifies the buyer that he will pursue this course, it is an "irrevocable" election. He cannot thereafter abandon such election and sue for the contract price or the difference between the contract price and the market price. In Kansas these principles apply to all sales contracts, regardless of whether the title to the goods has passed or not. *Central Trust Co.* v. *Adams,* 107 Kan. 126, 190 Pac. 775; *In re Mills' Estate,* 107 Kan. 492, 192 Pac. 761.

The leading case is *Central Trust Company* v. *Adams,* 107 Kan. 126, 190 Pac. 755 (on petition for rehearing—107 Kan. 492, 192 Pac. 761). Adams sold to Mills and took notes for the payment of the purchase price. Mills defaulted and Adams resold at private sale but applied the proceeds as part payment of the notes. Mills died and the unpaid balance of the notes was presented to and allowed by the Probate Court as a valid claim against his estate. The administrator, thereupon, sued Adams on the theory that, by reselling, Adams rendered himself unable to perform and consequently should return that portion of the purchase price which he had received. The Probate Court and the District Court of Kansas agreed with the administrator's theory and rendered judgment against Adams, which was reversed by the Supreme Court of Kansas.

> "We start, therefore, with a very simple and very common transaction. There was a sale of goods on credit, installments of the price were represented by

notes, title passed to the buyer, possession remained with the seller, and delivery was to be made on full payment of the price.

The buyer defaulted. His delinquency was persistent, so far as the evidence discloses was unexplained, and the seller was at liberty to choose some remedy from those which the law afforded him. He chose the remedy of self-help, resold the goods, and applied the proceeds of the resale to satisfaction of the oldest notes.

There is debate in the books concerning the capacity in which a seller like Adams acts when holding the goods, and when reselling them for the account of the buyer. Much of the debate is logomachy, resulting from the craving to name, and by naming to bring within some established general category, something not quite fitting into any such category. The word 'lien' is broad enough and descriptive enough to permit its employment in this connection, and it is enough to designate it 'seller's lien.' Likewise when the seller resells the goods it is enough to say that he acts as a seller having a seller's lien.

It is quite elementary that *just before resale* of the stock Adams stood at a point from which three paths diverged. He could *eliminate* the contract by rescinding the sale, treat the goods as his own, and do as he liked with them. He could *affirm* the contract, treat the buyer's obligation as subsisting, tender the goods to him or keep them for him, and inforce payment of the price. He could treat the contract as *broken,* resell the goods to recompense himself, as far as possible, for whatever loss he had sustained, and sue for *the remaining damages. He could take one path and only one, and, having made a choice, he could not afterwards return to the starting place and take another.*

* * * * * * *

When the seller elected to take damages instead of price, he *elected to renounce recovery on the notes.* They were obligations *to pay price, and not damages.*

* * * * * * * *

It so happened that, after application of the proceeds of resale the unpaid notes *exactly or substantially*

> equaled the remainder of the damages resulting from breach of the contract and Adams simply mistook his remedy. *He had no cause of action on the notes, and no choice between remedies, after the irrevocable act of resale. But one remedy was then available, an action for damages*, and his attempt to complete his relief by unauthorized means did not constitute an election, within the proper meaning of that term, which applies *to the first pronounced act of election*" (italics ours).

In the still later case of *Fee & Liddon Co.* v. *Porter*, 144 Kan. 108, 58 Pac. 2d 55, the Supreme Court of Kansas states:

> "This appeal involves the question of *whether statements contained in a letter constituted an election of remedies*" (italics ours).

The facts were that defendant had agreed to purchase certain real estate and, after making some payments, allowed the contract to go in default. After a period of time the seller wrote the buyer a letter, saying:

> "* * * I take it from this letter that you have no intention of completing the purchase of this lot. This is further clearly indicated by the fact that you have not made a payment on account in over a year and have not paid either interest or taxes for which you have been billed. The entire amount of the contract is, therefore, now due and payable. * * *
>
> We are accordingly, in accordance with the contract, demanding that these amounts, totalling $1,-698.85, be paid within the next thirty days, and should they not be paid we shall have to assume that you have no idea of completing this contract and we shall cancel it on our books in according with the terms thereof."

The trial court held that as a matter of law the statement contained in the letter "constituted an election to

cancel and rescind the contract. * * * and that such election released defendant from all further liability under the contract, and judgment was accordingly rendered in favor of defendant and against the plaintiff, which appears."

The Supreme Court of Kansas, affirming the judgment, said:

> "It is clear from the above contract that when the purchaser defaulted in payment, the vendor had an election either to cancel the contract and retain the payments theretofore made by the purchaser as liquidated damages, in which event the purchaser's rights to the real estate would be cut off, or to sue for the balance due on the contract, in which event the purchaser would be entitled to the real estate and the vendor would have to recover on his judgment. Faced with this situation, the vendor wrote the above letter. From it, it appears the vendor was convinced the purchaser did not intend to make further payments. After stating the balance then due, the vendor informed the purchaser that if this amount was not paid within the next thirty days, the contract would be canceled.
>
> *In this state, it has been consistently held that where a party has the right to choose between two inconsistent remedies and, with knowledge of the facts, deliberately elects to follow one of them, he cannot thereafter make a new election and pursue the other remedy, and that the election does not depend on the form, but on the essence of the remedy* (See *Ireland* v. *Waymire,* 107 Kan. 384, 191 Pac. 304, and cases cited; *Trust Co.* v. *Adams,* 107 Kan. 492, 192 Pac. 761; *Ramsey* v. *Bank Commissioner,* 115 Kan. 212, 216, 222 Pac. 117; *Pitt* v. *Keenan,* 124 Kan. 810, 262 Pac. 567). And various phases of the doctrine are treated in other of our decisions" (italics ours).

It is, therefore, clear that when the District Court in the case at bar, in the face of the admission by Butler's president on the witness stand that it, on breach of the contract, had elected to resell and had given notice to that effect and had made a resale pursuant to such election declared that "resale is immaterial" (Conclusions 2 and 3, R. 26) it was directly in conflict with a plain decision of the Supreme Court of Kansas. When it then proceeded to ascertain the market value at the time and place of breach and to assess damages as the difference between the contract price and market price and to render judgment against petitioners on such basis, it was doing that which is not countenanced and not permitted under the law of the State of Kansas.

The reasoning resorted to by the Circuit Court of Appeals in sustaining the judgment of the District Court thus arrived at is equally discordant with the law of Kansas.

To say, as it did, that the question of election to resell was *removed* from consideration because Butler and Horwitz (the purchaser at the resale), for reasons satisfactory to themselves, combined together a week or ten days after the resale to cancel the resale contract does not at all change or obscure the fact that the seller elected to resell. The buyer, whose measure of liability had thus become fixed, and who was vitally interested was not consulted. Since the buyer was bound by the election to resell, he could not be cast to a different liability, by an *ex parte* undisclosed, rescission of the sale. The seller's election to resell was as fully unequivocal as the election of the seller in the *Fee & Liddon Co. case, supra.*

It was more unequivocal because there was not only the announcement of an intention transmitted to the buyers but an actual resale pursuant to such announced intention. The fact that Butler and the purchaser at the resale saw fit for any reason, or for no reason, to cancel the contract of sale is legally immaterial under the laws

of Kansas so far as the question presented to the District Court and to the Court of Appeals is concerned.

The holding of the Circuit Court of Appeals that "there is no inconsistency of remedies" and that a "resale is but one method of determining the market price" when given the application indulged in by the courts below conflicts not only with the express statements of the Supreme Court of Kansas but with the essence of the rule as pronounced, expounded and applied by that court. The rights and liabilities of the buyer thus once fixed, could not be altered by collusions of the seller and the resale purchaser.

The Supreme Court of Kansas says the two things are not the same and are not intended to be the same. Even the fact that the application of the proceeds of resale to the unpaid notes in the *Central Trust Company Case, supra*, resulted in the balance of the notes exactly or substantially equalling the "remaining damages" after applying the net proceeds of resale was noted by the Supreme Court of Kansas, but it was nevertheless pointed out that notwithstanding such fact there was but one remedy then available and but one measure of damages available, namely to sue for and recover the difference between the contract price and the net proceeds of resale.

It is obvious that the learned Circuit Court of Appeals has, in preparing its opinion, adopted principles of law that may be announced by the courts of some states in such a situation but which are not followed in Kansas.

Nor is this the general rule followed by the Federal courts prior to *Erie* v. *Railroad Co., supra.* For example it is in direct conflict with the opinion of the Seventh Circuit Court of Appeals in *Sloss-Sheffield Steel & Iron Co.* v. *Stover Mfg. & Engine Co.*, 37 F. 2d 877, which held that where, as here, the seller has alternative remedies, upon an election to resell he *"is bound by it and cannot pursue*

an inconsistent remedy." In the *Sloss Case*, the market price at the time of breach was considerably below the contract price, but upon resale the goods brought a price in excess of the contract price. The Court held that the election was irrevocable and "having so elected, it cannot now recover the excess of the contract price over the market price."

The Kansas cases cited by the Circuit Court of Appeals that the measure of damages for breach of contract of sale is, under the rule established by Kansas decisions, *ordinarily* the difference between the contract price and the market price of the goods are not in point.

Here, as a consequence of the failure to accurately, fully and realistically apply settled principles of Kansas law, a recovery has been allowed with neither pleading nor proof of the only basis on which a lawful recovery could be had.

If there is to be any vitality to the pronouncement of this Court that "the law to be applied in any case is the law of the state," then enforcement of the rule must be required by this Court in such number of cases that the long established habit of courts of the United States will give way in a full realization that there are no principles of law affecting substantive rights to be applied or drawn upon except as they are found in the laws of the state.

Unless the force of old methods of approach is checked at the outset, the new era of uniformity of substantive rights in Federal and State courts will die aborning. Soon the whole principle of uniformity will be destroyed by the ingrafting of this or that exception to or modification of the law of the state and all contrary to the law of the state. The much to be desired uniformity will become a mere theoretical thing and not an actuality.

It is respectfully submitted that the writ prayed for be granted.

Respectfully submitted,

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